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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. ~~1425~~ 213

JOSEPH M. BRENNAN, Petitioner,

vs.

BERTHA E. SELLERS, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

JOSEPH M. BRENNAN, Petitioner,

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BERTHA E. SELLERS, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on February 1, 1966, and Order Denying Petition for Rehearing entered on March 25, 1966.

References herein will be to the page numbers of the Transcript of Record from the District Court.

OPINIONS BELOW

The judgment of the District Court for the District of Colorado was entered in favor of Defendant (Respondent) notwithstanding the jury's verdict in favor of Plaintiff (Petitioner), a copy thereof is appended hereto (APPENDIX-A). The opinion of the Court of Appeals for Tenth Circuit is reported in 357 F.2d. 150, a copy thereof is appended hereto (APPENDIX-B).

JURISDICTION

Petitioner's replevin suit was filed in the District Court for the District of Colorado on October 8, 1962, pursuant to the provisions of Title 28 USC 1331 & 1332, and that Court's judgment was entered on February 24, 1965 (R. pp. 39-40). The judgment of the Court of Appeals was entered on February 1, 1966, and that Court's denial of a Rehearing thereon was entered on March 25, 1966. The jurisdiction of this Court is invoked under Title 28 USC 1254(1), and Rule 21 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Did the simultaneous delivery to Petitioner by Respondent on September 28, 1954, of the duly endorsed in blank Rock Wool Co. Certificate of Stock No. 1, and, the pertinent duly executed, irrevocable and verified sale and assignment instrument, convey to and vest in Petitioner: All rights, title and ownership in and to said Certificate No. 1 and what is represented thereby, as provided by the Colorado Revised Statutes, viz, Chap. 31, Art.

11, Sec. 1, and in accordance with the universally established usages and customs pertaining to transfer of title in and to Certificates of Corporate Stock?

II. Was Petitioner, pursuant to the provisions of the Colorado Larceny Act, viz, Colo. Rev. Stats. Chap. 40, Art. 5, Secs. 2, 13 & 14, and Rule 104(m) of the Colo. R. Civ. P., entitled to recover the value of each of said two documents and damages for the wrongful taking and withholding of same from Petitioner by Respondent, in the event that said stolen property of Petitioner was not in possession of Respondent at the time of the institution of the within replevin suit, and in the event that Respondent could not restore said stolen property to Petitioner?

III. Was the verdict of the jury an ultimate determination of the Issues of fact, evaluation of the testimony and evidence presented at the trial, and credibility of the witnesses, that Petitioner was the owner of said Certificate No. 1, and the owner of said pertinent sale and assignment instrument, and entitled to compensation for the value thereof and damages for the wrongful taking and retention, in the event that Respondent could not restore said stolen property to Petitioner?

III(A). Was the District Court's judgment N. O. V., and denial of a new trial in the alternative, an unlawful attempt to re-examine the Issues of fact as determined by the jury, and in violation of Rule 50 F. R. Civ. P., and a denial of Petitioner's right to recover any part of his said stolen property?

III(B). Was the District Court's judgment incom-

plete and void by reason of its failure and neglect to rule on Petitioner's right to possession of his stolen sale and assignment instrument concerning said Certificate No. 1, and also, by reason of the fact that the theft of said two documents from Petitioner by Respondent was involved in the fradulent document filed in that Court in case No. 6177 therein, in direct violation of Title 18 USC 1001 & 1002?

IV. Was the Court of Appeals decision in its affirmance of the District Court's judgment, an erroneous and unlawful attempt to re-examine the issues of fact, weigh the testimony and evidence and the credibility of witnesses, all of which had been considered by the jury and ultimately determined by the jury's verdict; was it erroneous and unlawful for that decision to assert: (a) That Petitioner lacked any right of recovery of his said stolen property by reason that same was not in Respondent's possession at the time the replevin suit was commenced, in contradiction to the provisions of Colo. Rev. Stats., and Rule 104 (m) of Colo. R. Civ. P.; (b) that Petitioner had shown no consideration for the purchase of said Certificate No. 1, despite the prima facie evidence to the contrary, as registered on said Certificate No. 1, and on said pertinent sale and assignment instrument; (c) that Petitioner's services rendered to Respondent and expenses incurred therein, possessed no consideration or purchase value; and, (d) that Petitioner "FRANKLY STATED THAT HE GAVE APPELLEE (Respondent) NO SPECIFIC CONSIDERATION FOR THE SUBJECT 253 SHARES (of Rock Wool Co. capital stock)", despite Petitioner's testimony to the contrary, and despite the expressed "VALUE RECEIVED," as patently registered above the endorsement of Respondent on said Certificate No. 1, including,

the sworn statement of Respondent concerning such "CONSIDERATION," as patently registered on said sale and assignment instrument pertaining to the purchase by Petitioner of said Certificate No. 1 from Respondent?

STATEMENT

This Petition for Writ of Certiorari concerns the erroneous nature of the opinion of the Court of Appeals affirming the District Court's judgment for Respondent, notwithstanding the jury's verdict in favor of Petitioner, and the denial of a new trial in the alternative. Petitioner's replevin suit was brought to recover his stolen property from respondent, and for damages if same was not or could not be restored to Petitioner by Respondent, pursuant to the purview of the Colorado Revised Statutes (APPENDIX "C" & "D"); Rule 104 of the Colorado Rules of Civil Proceedure (APPENDIX "E"); the Seventh and Fourteenth Amendments of the United States Constitution; and, Secs. 23 & 25, Art. II of the Colorado Constitution.

On September 28, 1954, David L. Sellers and Bertha E. Sellers (husband and wife), who were the joint owners of Certificate of Stock No. 1, representing ownership of 253 shares of capital stock in Rock Wool Insulating Company (hereinafter referred to as: Rock Wool Co.), consummated an absolute sale and assignment of all of said Seller's rights, title and interest in and to said Certificate No. 1, unto Petitioner, by the simultaneous delivery thereupon to Petitioner of each of the following duly executed instruments, viz: (1) An irrevocable and verified sale and assignment of said Certificate No. 1 unto Petitioner (R. 1, EXHIBIT "A" & APPENDIX "F"; and, (2) said Certif-

icate No. 1 duly endorsed in blank by Sellers' (R. 1, EXHIBIT "B" & APPENDIX "G", and R. pp. 68-69). And each of said two documents remained in Petitioner's exclusive possession continuously from September 28, 1954, until Respondent stole same from Petitioner sometime in 1957-58.

On October 14, 1959, Respondent secretly and illicitly sold Petitioner's two pieces of stolen personal property, viz., said Certificate No. 1, and said pertinent sale and assignment instrument, to one Herbert F. Korholz (R. pp. 61 and 138).

On October 8, 1962, pursuant to the provisions of Title 28 USC 1331 & 1332, Petitioner filed the within diversity replevin suit in the District Court, wherein he sought recovery of his stolen personal property from Respondent, and for the incidental damages and value thereof, in the event that Respondent did not or could not restore same to Petitioner (R. pp. 1-3 & EXHIBITS "A" & "B"). On November 17, 1964, a pre-trial conference was held, and among matters considered, the CONTESTED ISSUES OF FACT remaining for decision were set out in writing in the documents as filed therein, viz: "PLAINTIFF'S PRE-TRIAL MEMORANDUM RE THE ISSUES AND LAW INVOLVED" (R. pp. 15-18); "PRE-TRIAL STATEMENT OF DEFENDANT, BERTHA E. SELLERS (R. p. 19); and, the "PRE-TRIAL ORDER" which was arbitrarily, capriciously, unlawfully and unjustifiably restrictively altered by the Court, after said Pre-trial Conference, and without any prior notice of such alteration, or any participation therein by Petitioner, and over his subsequent objection filed therein (R. pp. 21 & 25-26).

On February 2 & 3, 1965, trial to jury was held, whereupon the Court's instructions to the jury concerning said CONTESTED ISSUES OF FACT, and, the verdict of the jury concerning same, are recited as follows:

COURT'S INSTRUCTION TO THE JURY IN RE CONTESTED ISSUES OF FACT: "Now, if you find from the evidence in this case that Mr. Brennan was the lawful owner of Certificate No. 1 in October 1957, and if you find that the defendant Mrs. Sellers had in fact taken and converted the stock, or converted that stock to her own use and possession, then it will be your duty to award the plaintiff Brennan such damages if any that you determine from the evidence will reasonably compensate him for the injury and damage?" (R. pp. 190-191).

VERDICT OF THE JURY IN RE CONTESTED ISSUES OF FACT: "We the jury in the above-entitled case upon our oath do say, we find the issues joined in favor of Joseph M. Brennan and against the defendant Bertha E. Sellers and assess his damages at the sum of $53,133. Dated at Denver, Colorado, this second day of February, 1965. (Signed) Edward H. Perkins, foreman." (R. p. 35, and 194-195).

On February 24, 1965, the District Court entered an order directing a judgment for defendant (Respondent) notwithstanding the jury's verdict for plaintiff (Petitioner) under Rule 50(b) Fed. R. Civ. P., and denied a new trial in the alternative (APPENDIX "A"). The Court of Appeals in it's affirmance thereof, in pertinent part stated: (1) That it was a prerequisite under Colorado law in an action in the nature of replevin, that the defendant must have either actual or constructive possession (of the

stolen property) the subject stock certificate at the time the action is commenced; (2) that the verdict was set aside upon the ground that appellant (Petitioner) had not shown any consideration as a premise to his claimed stock purchase; (3) that appellant's (Petitioner's) services rendered to appellee (Respondent) in his investigative efforts were successful and did indeed enhance the value of Rock Wool stock, but such cannot be a legal premise for a claimed purchase of designated stock; and, (4) that appellant (Petitioner) frankly stated that he gave appellee (Respondent) no specific consideration for the subject 253 shares, admittedly appellee's total holdings in the Rock Wool Company (APPENDIX "B").

REASONS RELIED UPON FOR GRANTING THE WRIT

I

1. That the Uniform Stock Transfer Act as adopted by the State of Colorado prescribes the only method of transferring title in and to corporate stock (APPENDIX "C").

2. That the voluntary and simultaneous delivery to Petitioner of said duly endorsed in blank Rock Wool Co. Certificate of Stock No. 1, and said pertinent duly executed, irrevocable and sworn to sale and assignment instrument (R. pp. 1-3 & EXHIBITS—APPENDIX "F" & "G"), on September 28, 1954, vested in Petitioner all rights, title and interest in and to said Certificate No. 1, per the universally established Uniform Stock Transfer Act and Colorado law thereunder. Anything to the contrary would constitute the perpetration of a gross fraud upon Petitioner by Respondent.

3. That the "VALUE RECEIVED" for the irrevocable sale, assignment and transfer of all rights, title and interest in and to said Certificate No. 1 unto Petitioner, and the grant of power of attorney to have a new Certificate issued in place of said Certificate No. 1, is expressly conceded by the endorsement (APPENDIX "G"), and which written instrument was binding on Respondent, and in the absence of fraud, the Court could not lawfully disregard, ignore, modify, or nullify such duly executed instrument.

4. That the VALUE RECEIVED for the irrevocable sale, assignment and transfer of said Certificate No. 1 unto Petitioner, as paid to Respondent by Petitioner, is specifically stated and is registered on said duly executed sale and assignment instrument, as duly sworn to by Respondent (APPENDIX "F"), and which written instrument was binding on Respondent, and in the absence of fraud, the Court could not lawfully disregard, ignore, modify, or nullify such duly executed instrument.

5. That Respondent under oath affirmatively acknowledged Petitioner's said investigative services and involved exenditures as performed for and on behalf of, and under the direction of Respondent, as evidenced by said duly executed and irrevocable sale and assignment instrument (APPENDIX "F"), and also by said duly executed endorsed in blank said Certificate No. 1 (APPENDIX "G"), each of which documents registers the "VALUE RECEIVED" and the "CONSIDERATION" obtained from Petitioner by Respondent therefor.

6. That although Petitioner was lawfully empowered to have said Certificate No. 1 cancelled and a new Certifi-

cate of Stock in Rock Wool Co. issued in his name in place thereof at any time subsequent to September 28, 1954, Petitioner refrained therefrom, by reason that the Rock Wool Co. books and records were in the custody and control of a usurper, viz, Herbert F. Korholz.

7. That petitioner did not require possession of said Certificate No. 1 to make the investigations of Rock Wool Co. and of its usurper, viz, Herbert F. Korholz, as was requested to be done by Respondent, and wherein with Respondent's full knowledge and consent, and as ordered by Respondent, Petitioner did perform such investigative services, and therein incurred considerable expenditure of his funds, and wherein the records of such expenditures, including, said Certificate No. 1, and said pertinent sale and assignment instrument, were all stolen from Petitioner by Respondent in 1957 or 1958, and which caused Petitioner's inability to testify to the exact amount of such expenditures (R. pp. 98-99 & 114 to 117).

II

8. That the Colorado Larceny Act (APPENDIX "D") prescribes that said Certificate No. 1, and also, said pertinent sale and assignment instrument, are separate pieces of personal property. That Rule 104 of the Colo. R. of Civ. Proc. provides for the recovery of each piece of said property, it also provides for compensation and damages in the event that such property is not or cannot be restored to Petitioner by Respondent (APPENDIX "E").

III

9. That the jury's verdict was an ultimate determination that, Petitioner was the owner of said Certificate No.

1 and said pertinent sale and assignment instrument, in accordance with the fact presented to the jury for its determination, as specifically set forth in the Court's instructions to the jury (R. pp. 35, 190-191 & 194-195).

10. That the District Court's judgment notwithstanding the verdict of the jury, constitutes an unlawful attempt to reexamine the fact of Petitioner's ownership of said Certificate No. 1 as was ultimately found by said verdict to be vested in Petitioner. And, that the District Court's denial of a new trial without stating any grounds or reasons therefor, was in direct violation of Rule 50(c) of the Fed. R. Civ. P., and also, in direct violation of Petitioner's rights in the due process of law.

11. That the judgment of the District Court is incomplete, and therefor void, as no adjudication exists pertaining to Petitioner's right to recovery of his said stolen personal property, viz, said duly executed, irrevocable and verified sale and assignment instrument, and as set forth in the Complaint (R. pp. 1-3, EXHIBIT "A", and APPENDIX "F").

12. That by reason of a fradulent act committed in the District Court in violation of Title 18 USC 1001 & 2, in case No. 6177, concerning Rock Wool Co. stock ownership of Petitioner, the judgment herein is null and void.

IV

13. That the Court of Appeals opinion in its affirmance of the said judgment of the District Court, constitutes an unlawful attempt to reexamine the fact of Petitioner's ownership of said Certificate No. 1 as was ultimately found by said verdict to be vested in Petitioner. And, that said opinion of the Court of Appeals is in many respects er-

roneous and false, and wherein it palpably misstates, or misinterprets pertinent testimony, and disregards the expressed intent and effect of certain prima facie documentary evidence (Pertinent excerpts of said opinion are set forth in the Items (1), (2), (3) & (4), as referred to in the last paragraph of the STATEMENT herein), upon the basis of which testimony and evidence the jury determined the fact that, Petitioner was the owner of said Rock Wool Co. Certificate of Stock No. 1.

14. That the Court of Appeals decision disregarded applicable statutes, Rules of Civil Procedure, and long standing and established usages and customs concerning transfer of title to a Certificate of Corporate Stock; it disregarded applicable decisions of other Courts of Appeals and decisions of this Court; it disregarded prima facie documentary evidence; it disregarded pertinent testimony; it has wrongfully re-examined facts already determined by the jury; it has disregarded intrinsic fraud and violation of Title 18 USC 1001 & 1002 underlying Respondent's theft of Petitioner's property, viz, said Certificate No. 1 and said pertinent sale and assignment instrument, and other pertinent documents; it has so far departed from accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision.

ARGUMENT

I

The Uniform Stock Transfer Act as adopted by the State of Colorado (APPENDIX "C") establishes the only method of transferring title to a certificate of stock and

what is represented thereby. This has been definitely settled in the case of *Brennan v. Wills, Ltd.* (1957) CCA 10, 263 F(2) 1, 2, Cert. den. 360 U.S. 902, 79 S. Ct. 1284, 3 L. Ed. (2) 1254. And, as consistently followed by the Colorado Supreme Court. See—*Goedell v. Aircraft Finance Co.* (1963)—Colo.—382 P (2) 812, 814, citing Brennan v. Wills, Ltd. case.

It is patent that title to said endorsed in blank Rock-Wool Co. Certificate of Stock No. 1 was vested in Petitioner, by the simultaneous delivery thereof and said pertinent duly executed, irrevocable and verified sale and assignment instrument, on September 28, 1954.

The United States Supreme Court in the case of *Disconto-Gessellschaft,* 267 U.S. 22, 45 S. Ct. 207, 69 L. Ed. 495, 1925, has definitely established three important factors concerning transfer of ownership of certificates of corporate stock, as follows:

(1) That share of stock in a corporation, *represented by a certificate of stock, constitute property in themselves,* and not merely evidence of ownership;

(2) That it recognizes as *owner anyone to whom the person declared by the paper (the certificate of stock) to be the owner has transferred it by the endorsement in blank provided for on the back of the certificate of stock;*

(3) *That it does not depend upon the holder's having given value, but upon the things done by the endorsement on the back of the certificate of stock.*

To the same effect (and citing the Disconto case, supra) in the following cases, viz: *In re De Lamos Estate,*

315 P (2) 611, 627, 1957, citing, *Lohman v. Kansas City R. R. Co.*, 33 S. W. (2) 112, 72 A.L.R. 172, wherein it is said that, *certificates of stock must be regarded as having the character of property in themselves.*

II

The Colorado Revised Statutes under the purview of the Larceny Act (APPENDIX "D"), defines a Certificate of Stock and any pertinent sale and assignment instrument as personal property; prohibits transfer to any such stolen property; and prescribes the owners right to recover same.

PROPERTY OUT OF POSSESSION OF DEFENDANT CAN BE REPLEVIED, AND WRONGFUL TAKING THEREOF IS A QUESTION FOR THE JURY.

The Court of Appeals opinion (APPENDIX "B", p. 29) states that: "THE UNDISPUTED EVIDENCE INDICATED THAT APPELLEE (Respondent) HAD NEITHER ACTUAL OR CONSTRUCTIVE POSSESSION OF THE SUBJECT STOCK CERTIFICATE (Rock Wool Co. Certificate No. 1) AT THE TIME THE ACTION WAS COMMENCED, A PREREQUISITE UNDER COLORADO LAW IN AN ACTION IN THE NATURE OF REPLEVIN. COLORADO R. CIV. P. 104." Such opinion is absolutely erroneous in the light of said Rule 104(m) (APPENDIX "F"), which Rule 104(m) specifically provides "for a money judgment for the value of the property sought to be recovered, and damages for the retention thereof, in the event that defendant cannot restore the property sought by plaintiff." Significantly, such protection to plaintiff in replevin

actions has been definitely established in Colorado and elsewhere, e.g:

In *Harkey v. Tillman*, 40 Ark. 551 (1883), it was held that:

One wrongfully obtaining property and refusing to deliver on demand may be sued in replevin, though he has parted with the possession at the time of the suit. The Court in that case said that this is the common law of detinue, and it applies to all states where compensation in place of the property can be given in replevin.

In *Melnick v. Bowman*, 102 Colo. 384, 79 P. (2) 386 (1938), it was held that:

The Court may award a money judgment although action is technically designed as a replevin. Code Civ. Proc. 247. The case was not tried on theory that plaintiff was entitled to possession; but on that of conversion of the property by the defendant (Sec. 247 of C.C.P. '35 C.S.A., Vol. 1, C. 18). Judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the retention.

In *Barslund v. Anderson*, 106 Colo. 238, 103 P. (2) 22 (1940), it was held that:

Disallowance of an alternative money judgment in a replevin action as provided by Statute was improper. Code Civ. Proc. Secs. 221, 247.

In *Rosen v. Redco Co.*, 362 P. (2) 1095-6 (1960), it was held that:

Since defendant had originally obtained possession of the goods wrongfully, the plaintiff was not barred from main-

taining an action even if though the defandant did not have possession at the time the suit was filed.

Thus, under the defendant's defense and under the elementary rules of evidence, the question of whether or not the defendant wrongfully took plaintiff's property and disposed of it, was a question for the jury, and the jury having determined the question in favor of the plaintiff, such settled FACT now inhers in the judgment, citing, 46 Am. Jur., Replevin, Sec. 35, p. 23.

THE JURY DETERMINED THE FACT

Significantly, in the within suit of Petitioner, the jury determined the ultimate FACT that: Plaintiff (Petitioner) was the owner of said Certificate No. 1 and said pertinent sale and assignment instrument, and entitled to damages of $53,133 therein in the event that said two documents could not be restored to Petitioner by Respondent (APPENDIX "F" & "G", and R. pp. 194-195). The jury's verdict, with absolute finality, determined such FACT from the evidence presented at the trial, and in accordance with the relative instructions of the Court to the jury (R. pp. 190-191), and as recited in the Reasons for Granting the Writ of Certiorari, in paragraph 8 thereof.

DOCUMENTS SHOW THE CONSIDERATION

The Court of Appeals opinion (APPENDIX "B, " p. 29) states that: "THE VERDICT (in favor of Petitioner) WAS SET ASIDE UPON THE GROUND THAT APPELLANT (Petitioner) HAD NOT SHOWN ANY CONSIDERATION AS A PREMISE TO HIS CLAIMED STOCK PURCHASE." Such opinion is absolutely erro-

neous in the light of prima facie evidence, viz: (1) "VALUE RECEIVED," as registered on said endorsed Certificate No. 1 (APPENDIX "G"); (2) "FOR AND IN CONSIDERATION OF THE PAYMENT OF TEN DOLLARS (10.00) AND OTHER VALUABLE CONSIDERATIONS THE RECEIPT HEREOF IS HEREBY CONFESSED AND ACKNOWLEDGED ***", as registered on said pertinent sale and assignment instrument (APPENDIX "F"); (3) by the undenied services and expenditures rendered Respondent by Petitioner

(R. pp. 114 to 119 & 123); and, (4) by Petitioner's inability to testify to the full and exact amount of such expenditures, due to the fact that Respondent had stolen the pertinent expenditure records from Petitioner in 1957 or 1958.

SERVICES AND EXPENDITURES HAVE VALUE

The Court of Appeals opinion (APPENDIX "B", p. 30) states that: "APPELLANTS (Petitioner's INVESTIGATIVE EFFORTS WERE SUCCESSFUL AND DID INDEED ENHANCE THE VALUE OF ROCK WOOL STOCK, BUT SUCH CANNOT BE A LEGAL PREMISE FOR A CLAIMED PURCHASE OF DESIGNATED STOCK." Such opinion is plainly erroneous, for in fact and effect, the judges that so opined would be asserting that, their services rendered to the United States Government "would not be a legal premise for a purchase" of Government bonds by said judges in lieu of any other compensation. In either of the aforesaid instances any such contentious opinion is absolutely untenable.

FALSE ASSERTION IN RE TESTIMONY

The Court of Appeals opinion (APPENDIX "B", p. 30) states that: "APPELLANT (Petitioner) FRANKLY STATED THAT HE GAVE APPELLEE (Respondent) NO SPECIFIC CONSIDERATION FOR THE SUBJECT 253 SHARES, ADMITTEDLY APPELLEE'S TOTAL HOLDINGS IN THE ROCK WOOL COMPANY." Such opinion is completely erroneous, and in all respects belies Petitioner's sworn testimony, and constitutes an absolutely false representation of Petitioner's testimony. A clear elucidation thereof is shown by Petitioner's uncontradicted testimony, pertinent exerpts thereof are as follows, viz:

(R. pp. 122-3) " THE COURT: I WANT TO ASK A QUESTION OR TWO. MR. BRENNAN, DO I UNDERSTAND THAT IT IS YOUR TESTIMONY THAT MRS. SELLERS ASSIGNED THIS STOCK CERTIFICATE AND EXECUTED THE ADDITIONAL ASSIGNMENT TO YOU FOR NO CASH CONSIDERATION BUT FOR CONSIDERATION OF YOUR DOING CERTAIN INVESTIGATIVE WORK ABOUT THE COMPANY? IS THAT RIGHT?"

"THE WITNESS: No, it is not correct, Your Honor. It was for the money that I had spent, already had spent, and for services which I was to perform, and I have been trying to explain, Your Honor, that she told me she wanted nothing more. She had no ownership in the stock."

"THE COURT: She said she wanted nothing more and you wanted the actual ownership of the stock in consideration for your--"

"THE WITNESS: For the services I had performed and the money I had spent."

The wanton distortion of Petitioner's testimony upon the basis of which the Court of Appeals opinion states that: APPELLANT (Petitioner) FRANKLY STATED THAT HE GAVE APPELLEE (Respondent) NO SPECIFIC CONSIDERATION FOR THE SUBJECT 253 SHARES", attempts to bind Petitioner to the unlawful cutting-off of his testimony by the trial Judge, and which conduct is clearly shown as follows:

(R. pp. 124-125) Regarding the outrageous badgering of Petitioner by the trial Judge in re his testimony exclusively concerning a Dr. Bates' $5,000 promissory note as was assigned to Petitioner by Dr. Bates, and to wit:-"THE COURT: Did you pay it? THE WITNESS: No, but Dr. Bates assigned it to me. THE COURT: Assigned what? THE WITNESS: Assigned the paid promissory note. THE COURT: All right, THE WITNESS: And I was to finish the lawsuit if she wanted to go ahead with it. THE COURT: And did you finish it? THE WITNESS: The lawsuit—it is laid in pending—THE COURT: I said did you finish it? THE WITNESS: I finished it, yes, in that respect. THE COURT: What lawyer did you hire and how much did you pay? THE WITNESS: Blood & Stone got the $5,000. THE COURT: From you? THE WITNESS: No, from Dr.. Bates. THE COURT: No, yourself, what did you pay? THE WITNESS: I paid what she assigned to me. THE COURT: How many dollars? THE WITNESS: The promissory note was $5,000. THE COURT: You paid $5,000? THE WITNESS: NO. Dr. Bates. THE COURT: I am asking what you paid? THE

WITNESS: Whatever value I had in the note that was assigned to me, a paid promissory note. THE COURT: You paid nothing then in money, is that right? THE WITNESS: Nothing, only the equity, whatever it might be. THE COURT: I said nothing in money. Did you pay anything in money? THE WITNESS: The $5,000 was paid. THE COURT: And you paid $5,000? THE WITNESS: No. Dr. Bates paid it and told me. THE COURT: I know, Mr. Brennan. What did you, Joseph Brennan, pay, not what somebody else paid? What did you pay this lady: THE WITNESS: I didn't pay anything—(OF THE $5,000 PROMISSORY NOTE, BECAUSE IT WAS PAID BY DR. BATES, AS I HAVE TESTIFIED). THE COURT: "All right, you have answered it."

UNDENIED SERVICE TESTIMONY

(R. pp. 68-69) "I told Mr. Sellers and Mrs. Sellers in the presence of Reilly, 'If you sell that stock to me, I want the certificate endorsed in blank by both Mr. Sellers and Mrs. Sellers on the back. I want you to bring that to a bank in Denver and I want an official of that bank to certify those signatures. In addition to that, I want you to execute a specific assignment and this assignment would be an irrevocable assignment.' I explained to them that an irrevocable assignment could not be cancelled. 'I want you to include in that assignment a statement that this an act and deed of your own free will. I want you to swear to that document.'" "Q. Was that done, Mr. Brennan by Mr. and Mrs. Sellers? "A. Yes, it was."

(R. pp. 71-72) "Q. What were you to do, if anything, Mr. Brennan, for Mrs. Sellers, for which she gave you

Stock Certificate No. 1?" "A. I have testified to that several times and I can only say it over again, I was to investigate the exploitation of Rock Wool (and Herbert F. Korholz), which was alleged by Reilly and Sellers, in his usurpation of the company and I was to investigate Korholz personally as well as what he was doing with the company." "Q. And did you perform those services for Mrs. Sellers?" "A. Oh, yes." "Q. Over what period of time did you perform those services?" "A. Well, I began in the end of March, 1954, and there was a continuous performance until sometime I think in June, 1958."

UNDENIED EXPENDITURE TESTIMONY

(R. p. 114) "Q. Mr. Brennan, I want you to tell this jury what, if anything, you paid Mr. and Mrs. Sellers for the transfer of Stock Certificate No. 1?" (R. p. 115) "Q. Are you able to make any estimate for the Court and the jury as to the approximate amount of monies expended." "A. Oh, I spent over $500 by the time they assigned that to me without any compensation for services." "Q. Did you advise Mrs. Sellers what services you had actually expended on her behalf and on behalf of her husband?" "A. Oh, yes, I did in detail, gave her all of the documents I executed." (R. p. 117) "Q. Did you further expend sums of money?" "A. Oh, yes, I spent considerable money afterwards." "Q. Could you anticipate or approximate for this Court and jury what that amount might have been on the business of Rock Wool and Korholz?" "A. Oh, yes, exclusively Rock Wool, and I made very expensive reports. I know one—I think the multigraph work and the lithograph work of charts and things, I think it ran $1,000. Now, there was another ex-

pense all the time that I told them about. I was maintaining an apartment." (R. p. 118) "Q. Did you receive any remuneration from Mrs. Sellers for the services and your expenditures other than the transfer of Certificate No. 1?" "A. No. I received nothing whatsoever." "Q. Did you receive it from anyone else?" "A. No. I did not."

III

THE DISTRICT COURT'S JUDGMENT N. O. V.; its denial of a new trial without stating any grounds or reasons therefor in violation of Rule 50(c) F. R. Civ. P.; its failure to render a complete judgment on all of Petitioner's stolen property, viz, said Certificate No. 1, and also, said pertinent sale and assignment instrument; its failure to consider the underlying extrinsic fraud and involved violation of Title 18 USC 1001, constitutes an erroneous, incomplete and void judgment, as likewise does the Court of Appeals decision in affirmance thereof. Respondent's motion for judgment N. O. V. and for a new trial in the alternative, assigned inappropriate grounds, that the verdict was excessive and contrary to law, for, as said in *Montgomery Ward* v. *Duncan*, 311 U.S. 243, 249, 85 L.Ed. 147, 61 S.Ct. 189: "The Motion for a new trial assigned grounds not appropriate to be considered in connection for the motion for judgment. It put forward claims that the verdict was against the weight of evidence and was excessive * * * An affirmative finding with respect to any of these claims would have required a new trial, whereas none of them could have been considered in connection with the motion for judgment." Significantly, said Rule 50(b) has not taken away from the jury and given to the trial judge any part of the jury's

exclusive power to weight the evidence; to test the credibility of the witnesses; and, to determine where the preponderance of evidence lies concerning the controverted issues of Fact. In *Lind* v. *Schenley, Inc.,* CCA 3, 278 F. (2) 79, 90 (1960) it is said: The trial judge by negating the jury's verdict has substituted the judgment of the facts and the credibility of the witnesses for that of the jury."

THE CONTESTED ISSUE OF FACT, as resolved herein by the jury, was: That Petitioner was the owner of said stolen Certificate No. 1, and of said stolen pertinent sale and assignment instrument (R. pp. 194-195 & APPENDIX "F" & "G"). The authenticity of which two documents was admitted, and each of which two documents patently register the "VALUE RECEIVED" and the "SPECIFIC CONSIDERATION" as received by Respondent from Petitioner for the purchase of said Certificate No. 1, and as testified to by Petitioner (R. pp. 68-69, 72-73, 114-117), despite Petitioner's inability to state the exact amount of his related expenditures, by reason of the theft of the pertinent expenditure records from Petitioner by Respondent in 1957 or 1958 (R. pp. 113-116, concerning Petitioner's services rendered to Respondent from March 1954 until July 1958 (R. pp. 71-72), and as not denied by Respondent (R. p. 123).

In *Crusade* v. *Cap. Transit Co.* (Mun. Ct. App. D. C. 63A(2) 878, 880, it is said: "The weight of evidence and the ~~availa~~credibility of witnesses are matters for the jury."

LACK OF CONSIDERATION being an affirmative defense must be raised by Answer, under Rule 8(c) of the F. R. Civ. P., and no such claim is made in Respondent's Answer to the Complaint, not is any such claim registered

in the Pre-Trial Order, and no mention thereof is made in the District Court's judgment in favor of defendant N. O. V. (APPENDIX "A"). The relative decision of the Court of Appeals disregards the prima facie documentary evidence and pertinent testimony (APPENDIX "F" & "G" & R. pp. 68-69, 72-73, 114-117).

THE SALE & ASSIGNMENT INSTRUMENT pertaining to said Certificate No. 1, was part of Plaintiff's stolen property sought to be recovered, and the District Court's failure to adjudicate Petitioner's right thereto, left an incomplete and invalid judgment. Moreover, the District Court had full knowledge of the fraudulently intended and designed Motion to dismiss the Rock Wool Co. suit No. 6177 in that Court, which affected Petitioner's rights in and to certain Rock Wool Co. capital stock, and wherein the sale of said Certificate No. 1 by Respondent in 1959, was predicated on said filing in said Court in said case No. 6177, of said fraudulent document in direct violation of Title 18 USC 1001 & 1002.

IV

THE COURT OF APPEALS DECISION is arbitrary, capricious and erroneous; it disregards the applicable Statutes, and Rules, and accepted and established usages and customs concerning transfer of title to a Certificate of Corporate Capital Stock (APPENDIX "C"), and also, the right of recovery of any stolen personal property (APPENDIX "D" & "E"); it disregards prima facie documentary evidence concerning "VALUE RECEIVED" and the "SPECIFIC CONSIDERATION" that was received by Respondent from Petitioner for the

purchase of said Certificate No. 1 (APPENDIX "F" & "G"); it disregards pertinent testimony concerning such "VALUE RECEIVED" and "SPECIFIC CONSIDERATION" (R. pp. 68-69, 72-73, 114-117); it greviously and erroneously misinterprets Petitioner's testimony concerning said "SPECIFIC CONSIDERATION" (R. pp. 124-125), and which directly contradicts Petitioner's testimony (R. pp. 122-123); it disregards applicable decisions of this Court, e.g.: The *Disconto-Gessellschaft* case, supra; and, the decisions in the cases, viz: In *Tenant* v. *Peoria Co.*, 321 U.S. 29, 35, 88 L.Ed. 520, 64 S.Ct. 409, it is said: "It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts." In *Lavender* v. *Kurn*, 327 U.S. 645, 652-3, 90 L.Ed 916, 66 S.Ct. 740, it is said: "It would be an undue invasion of the jury's historic function for the appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite to one reached by the jury (citations)." In *Slocum* v. *N. Y. Life Ins. Co.*, 228 U.S. 364, 398, concerning a trial to jury it is said. "Such a trial was had resolving all the issues in plaintiff's favor. That verdict operated, under the Constitution to prevent a re-examination of the issues save in a new trial * * * But instead of ordering a new trial, as was required at common law, the Court of Appeals itself re-examined the issues resolving them in favor of defendant, and directed judgment accordingly. This we hold could not have been done consistent with the Seventh Amendment, which not only preserves the common law right to trial by jury, but expressly forbids that issues of fact settled by such trial shall be re-examined other than according to the rules of

common law." In the within action the Court of Appeals wrongfully and unlawfully re-examined the issues which had been ultimately determined by the jury."

CONCLUSION

By reason of the foregoing it is obvious that Petitioner was denied his right to the ultimate resolution of the jury's verdict in accordance with the provisions of the Seventh Amendment, and also denied his right to recover any part of his said stolen personal property in violation of the Fourteenth Amendment and the pertinent Colorado Constitution, Statutes and Rules of Civil Procedure.

WHEREFORE, it is respectfully submitted that the judgment of the District Court and the Court of Appeals decision in affirmance thereof be set aside and reversed, and the jury's verdict in favor of Petitioner be reinstated, or in the alternative that a new trial be ordered in the circumstances.

Respectfully submitted,

Joseph M. Brennan,
Petitioner, Pro se,
P.O. Box 1115, Denver 1, Colorado

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JOSEPH M. BRENNAN,

Plaintiff,

vs.

BERTHA E. SELLERS,

Defendant.

Civil Action No. 7754

JUDGMENT IN FAVOR OF DEFENDANT

THIS MATTER came on for trial on the 1st day of February, 1965, before the Court and a jury, the Honorable Alfred A. Arraj, Chief Judge, presiding, the issues having been duly tried and the jury having duly rendered its verdict in favor of plaintiff, and the same having been recorded, an Order was entered that the entry of judgment be deferred. Thereafter this cause came on for hearing on the defendant's Motion for Judgment Notwithstanding the Verdict and for a New Trial in the Alternative. The Court of February 24, 1965 entered an Order granting the defendant's Motion for Judgment Nothwithstanding the Verdict, and set aside the Verdict, and denied the Motion for New Trial. It is, therefore,

ORDERED, ADJUDGED AND DECREED:

1) That the plaintiff take nothing on his complaint and that the action and complaint be dismissed.

2) That the defendant have and recover from the plaintiff her costs to be taxed on the filing of a Bill of Costs with the Clerk of the Court.

DATED at Denver, Colorado, this 26th day of February, 1965.

BY THE COURT: (Signed ALFRED A. ARRAJ)
(CONFORMED COPY) Chief Judge

APPENDIX "B"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH M. BRENNAN,
Plaintiff-Appellant,
vs.
BERTHA E. SELLERS,
Defendant-Appellee.

January Term, 1966

Appeal from the United States District Court for the District of Colorado. No. 8242

Before PICKETT, LEWIS and HILL, Circuit Judges.
LEWIS, Circuit Judge.

This appeal is taken by the appellant-plaintiff, pro se, from an order of the District Court for the District of Colorado directing a judgment notwithstanding the verdict under Rule 50(b), Fed. R. Civ. P. Appellant, by complaint prepared and filed pro se, had sought in a diversity action to recover from appellee-defendant the physical possession of stock certificate No. 1, representing 253 shares of the Rock Wool Insulating Company, a Colorado Corporation,[1] upon allegation that he had purchased such

[1]This controversy relates to extended litigation brought by Mr. Brennan concerning the ownership of Rock Wool Insulating Co. stock. For other cases decided by this court see Brennan v. Rock Wool Insulating Co., 10 Cir., 337 F.2d 849; Brennan v. Korholz, 10 Cir., 293 F.2d 751; Brennan v. W. A. Wills, Ltd., 10 Cir., 263 F.2d 1, cert. denied, 360 U.S. 902, 79 S.Ct. 1284, 3 L.Ed.2d 1254.

shares from appellee in 1954, that such certificate had been delivered to him, that appellee had later surreptitiously regained possession and had continued to withhold possession of the stock notwithstanding demand. In a second alleged cause of action appellant asserted that appellee's acts had damaged appellant in his capacity as an officer and stockholder of Rock Wool to the extent of $10,000.

Although appellant was then represented by counsel, the trial proceeded with great difficulty and the record reveals a complete failure of proof upon appellant's specific claims. The undisputed evidence indicated that appellee had neither actual nor constructive possession of the subject stock certificate at the time the action was commenced, a prerequisite under Colorado law in an action in the nature of replevin. Colorado R.Civ.P. 104. Cf. Brennan v. W. A. Wills, Ltd, 10 Cir., 263 F.2d 1, cert. denied, 360 U.S. 902, 79 S.Ct. 1284, 3 L.Ed.2d 1254. Appellant's second claim was totally unsupported by evidence. The case was, however, submitted to a jury upon a then urged theory of conversion and resulted in a verdict favoring appellant. The verdict was subsequently set aside upon the ground that appellant had not shown any consideration as a premise to his claimed stock purchase.

The verdict of the jury was properly set aside and the judgment is affirmed. When pressed several times by both court and counsel to state what consideration moved from him to appellee for the claimed right to legal title to the subject stock, appellant countered only by a narrative of services rendered to appellee as one of numerous stockholders of Rock Wool in a continuing and persistent investigation of suspected corruption in the then management

of Rock Wool.[2] Appellant's investigative efforts were successful and did indeed enhance the value of Rock Wool stock, but such cannot be a legal premise for a claimed purchase of designated stock. Appellant frankly stated that he gave appellee no specific consideration for the subject 253 shares, admittedly appellee's total holdings in the Rock Wool Company.

(CONFORMED COPY)

APPENDIX "C"

Under the Uniform Stock Transfer Act, the Colorado Revised Statutes, 1953, viz: Chap. 31, Art. 11, Sec. 1, provides for transfer of title to corporate stock as follows:

"(1) By delivery of the certificate endorsed in blank or to a specified person appearing in the certificate to be the owner of such stock, or

"(2) By delivery of the certificate and a separate written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby."

APPENDIX "D"

The Colorado Revised Statutes, 1953, viz: Chap. 40, Art. 5, Secs. 2, 13 & 14, provides for recovery of stolen personal property as follows:

[2]Appellee testified that she assigned and delivered the stock certificate to appellant as an aid to his investigative efforts.

"*Larceny, Penalty* 40-5-2": Shall embrace every theft that deprives another of his personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained, or the taking or carrying away of any instrument in writing of value to the owner, and as defined in "*Stealing Certificate* 118-10-93."

"*Larceny — Personal Property — Action To Recover* 40-5-13: All property obtained by larceny, robbery, and burglary shall be restored to the owner, and no sale whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. Such owner may maintain his action not only against the felon, but against any person in whose possession he may find the same."

"*Larceny by Bailee* 40-5-14 If any bailee, by finding, or otherwise of money, bank bill, or note, or goods, or chattels, shall convert the same to his own use with intent to steal the same, shall be deemed guilty of larceny in the manner as if the original taking has been feloneous***."

APPENDIX "E"

Rule 104 of the Colorado Rules of Civil Procedure, provides for replevin of personal property, and for Judgment for the value thereof if delivery cannot be had, and for damages for the retention, and that the complaint in replevin contain the allegations as follows:

"(1) That the plaintiff is the owner of the property claimed, particularly describing it; or is lawfully entitled to the possession thereof;

"(2) That the property is wrongfully detained by the defendant;

"(3) That the same has not been taken for a tax***; and

"(4) The value of the property.

"(m) JUDGMENT. In an action to recover possession of personal property, judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the retention."

APPENDIX "G"

INCORPORATED UNDER THE LAWS OF THE STATE OF COLORADO

No. 1 — Shares 353

ROCK WOOL INSULATING COMPANY

CAPITAL STOCK $350,000.00

THIS CERTIFIES THAT David L. Sellers & Bertha E. Sellers, joint tenants is the owner of Two Hundred Fifty-Three Shares of the Capital Stock of Fully Paid and Non-assessable

transferable only on the books of the Corporation by the holder hereof, in person or by Attorney, upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation, this 17th day of March A.D. 19 47

Anne Blackshear SECRETARY — Anthony E. Reilly PRESIDENT

SHARES $100 Par EACH

P.Ex 2 — 1959 — Dec 31 Ex M

6192 Kartzke Dep #30 — 8/12/63

6193 Mendes Dep. Olm Exh # 4 — 8/13/63

6192 Kartzke Dep #31 30 — 8/13/63 M.S.A.

For Value Received, hereby sell, assign and transfer unto _____

_____

Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

_____

to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated _____ 19__

In presence of

_____

David L Sellers

Bertha E. Sellers

SIGNATURE GUARANTEED THE COLORADO SPRINGS NATIONAL BANK

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT ALTERATION OR ANY CHANGE WHATEVER

RED-CHECK

APPENDIX "F"

For and in consideration of the payment of Ten Dollars ($10.00) and other valuable considerations the receipt hereof is hereby confessed and acknowledged, the undersigned party(s), namely, David L. Sellers and Bertha E. Sellers hereby sells, assigns and transfers unto Joseph M. Brennan, all my (our) right, title and interest in or to the Capital Stock of the Rock Wool Insulating Company (a Colorado Corporation), as registered on the books of the said company in my (our) name(s), viz: David L Sellers and Bertha L. Sellers which Capital Stock ownership is represented by and duly executed and issued Stock Certificated of the said company, to wit:

Certificate No.	No. of Shares	Date of Issue	Signed by Company Officers
1	253	March 17,1947	Anthony E. Reilly, President, and Anne Blockhan Secy.&Treas.

And, I (we) David L. Sellers and Bertha E. Sellers do hereby irrevocably constitute and appoint the said Joseph M. Brennan to transfer, or cause to be transferred, the said Stock on the books of the said Rock Wool Insulating Company with full power of substitution in the premises.

Dated at Denver, Colorado this _____ day of August A.D. 1954.

D.L. Sellers
David L. Sellers

Bertha E. Sellers
Bertha E. Sellers

STATE OF COLORADO }
COUNTY OF DENVER } SS.

David L. Sellers and Bertha E. Sellers on lawful age, first having been duly sworn upon our oath, deposes and says that I (we) have executed the above and foregoing instrument as my (our) free, independent and voluntary act and deed this 28th day of Sept A.D. 1954.

Subscribed and sworn to before me this 28th day of Sept A.D. 1954.

Notary Public

My Commission Expires March 28, 1956

6393
DEF EX 5
Dec 4, 1959

6393
DEF EX 5
Dec 3, 1959

Depo Exhibit 29-E for ID. 4/15/63

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 243

JOSEPH M. BRENNAN, *Petitioner,*

vs.

BERTHA E. SELLERS, *Respondent.*

Petition For Rehearing And Reconsideration Of The Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOSEPH M. BRENNAN, *Pro Se*
P. O. Box 1115
Denver, Colorado 80201

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 243

JOSEPH M. BRENNAN, *Petitioner,*

vs.

BERTHA E. SELLERS, *Respondent.*

Petition For Rehearing And Reconsideration Of The Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Petitioner prays that the Court vacate and set aside its Order of October 10, 1966, denying his Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and grant a rehearing and reconsideration thereof, and as grounds and reasons therefor Petitioner submits and points out matters, facts and things, of which this Court may not have been properly and fully informed of the gravity and widespread aspect thereof, or that it overlooked or misapprehended, and which are in part set forth as follows:

NOTE: Petitioner's Motion to the Court of Appeals for permission to print the Record for transmittal to this Court was not granted, and the original record was sent to this Court in lieu thereof by the Court of Appeals, and in denial of Petitioner's rights therein. Consequently, pertinent references herein are made to the printed Petition for Writ of Certiorari as filed in this Court by Petitioner.

1. That in numerous instances Petitioner was patently denied his rights under the Constitutions of the United States and the State of Colorado; patently denied and foreclosed in his rights under pertinent Statutes in his Replevin suit to recover his stolen personal property, or for the value thereof and incidental damages; and, thereby denied his rights to the due process of law.

2. That in the denial of Petitioner's aforesaid rights, and his every other justifiable rights, the following inescapable material fact underlying his said Replevin suit, is: That each of the ORIGINALS of the two pieces of Petitioner's personal property, as shown by the facsimile photo copies thereof as appended hereto and marked EXHIBITS "F" and "G" (and as were appended to the within Petition for Writ of Certiorari), are only a very small part of Petitioner's personal property and entire personal possessions, which were stolen from Petitioner by Respondent, in connivance and conspiracy with one Anthony E. Reilly in 1957-1958, whereupon, said parties broke into, entered and stole from Petitioner's temporary abode at Denver, Colorado, all of his said personal property and possessions. Significantly, said stolen property included all of Petitioner's possessions, documents, communications and memoranda, particularly those pertaining to said stolen property as shown by said EXHIBITS "F" and "G", and

3. That the U. S. District Trial Court arbitrarily, capriciously and unlawfully denied and foreclosed Petitioner in his rights to the due process of law by its acts and conduct as stated in part as follows, viz:

(a) By said Court's threat to dismiss Petitioner's Replevin suit and his rights therein to recover each piece of his said stolen personal property as shown by said EXHIBITS "F" & "G", and

(b) To compel Petitioner to proceed with the trial on the theory of the conversion of said EXHIBIT "G" by Respondent (As cited in Petition for writ of certiorari, APPENDIX "B", p. 29, par. 2), despite the issues joined for trial of and concerning Petitioner's absolute right of recovery of each two pieces of his said stolen property as shown by said EXHIBITS "F" & "G", and

(c) To foreclose and deny Petitioner his rights to replevy his said piece of stolen personal property as shown by said EXHIBIT "F", by said District trial court's acts, as set forth in Items (a) & (b) above.

4. That although said District Trial Court's dismissal of Petitioner's Replevin suit is vacuous of proper and required reason therefor, despite the verdict of the twelve member jury in favor of Petitioner, nevertheless, the stated reasons for the Court of Appeals affirmance thereof, are, patently baseless and absolutely erroneous. An elucidation thereof (as cited in the Petition for Writ of Certiorari, APPENDIX "B", pp. 29 and 30), are, in pertinent part set forth as follows:

(a) The Court of Appeals ruling erroneously asserts that: As Petitioner did not have either actual or construc-

tive possession of either of his said stolen pieces of personal property, as shown by said EXHIBITS "F" and "G", at the time he commenced his Replevin suit to recover same, he could not recover same in an action in Replevin under the purview of Colorado law, viz, Colorado R. Civ. P. 104. Indeed, said Colorado R. Civ. P. 104 (m), specifically provides,

> "(m) JUDGMENT. In an action to recover possession of personal property, judgment for the plaintiff (Petitioner) may be for the possession or the value thereof in case a delivery cannot be had and damages for the retention."

Such a judgment is what Petitioner sought and to which he was fully entitled to in his said Replevin suit, and upon which basis the issues were joined, and wherein the trial jury found a verdict of $54,000.00 in favor of Petitioner, and

(b) The Court of Appeals ruling erroneously asserts that: Petitioner's only consideration for the purchase of the subject stock certificate (EXHIBIT "G") was Petitioner's services rendered to Respondent, is patently belied by Petitioner's testimony of record, and which clearly establishes and stands uncontradicted, that Petitioner in addition to rendering said services incurred considerable expenditures of his own funds, and wherein he testified to at least two sums of money therein, viz, approximate amounts of $500.00 at one time, and an amount $1,000.00 at another time, although, it was extremely difficult for Petitioner to testify at the 1965 trial, as to such expenditures made during the period from 1954, by reason that all of Petitioner's records of such expenditures, and all communications by and between Petitioner and Respond-

ent, concerning such expenditures and services rendered, in accordance with Respondent's directions, had been stolen from Petitioner by Respondent in 1957-1958, as stated in paragraph (2) hereof, and

(c) That in the face of the acts and conduct of Respondent as set forth in Item (b) above, and the involved theft by Respondent of Petitioners records and personal property as set forth in paragraph (2) above, the Court of Appeals sets up as an excuse to affirm the dismissal of Petitioner's Replevin suit upon the absolutely untennable basis that: Petitioner's services rendered to Respondent and his said expenditures incurred therein for and on behalf of Respondent and as rendered in accordance with Respondent's directions and orders "cannot be a legal premise for a claimed purchase of designated stock (EXHIBIT "G", although) Appellants (Petitioner's) efforts were successful and did indeed enhance the value of Rock Wool (Insulating Co. capital) stock." And, for which valuable services and money expenditures of Petitioner, Respondent affirmatively acknowledged by the execution and delivery to Petitioner of each of the ORIGINALS of said EXHIBITS "F" and "G". And, thereafter with ruthless and wanton abandon Respondent attempts to obliterate Petitioner's rights and interests in and to recovery of any part of Petitioner's stolen property and possessions, the theft of which was instigated and carried into effect by Respondent and as more fully set forth in paragraph (2) above, and which wholesale theft, the said Court's attempt to condone and approve by their aforesaid rulings and judgments to the detriment and injury of Petitioner and the denial of his rights to the due process of law in his said Replevin suit, and

(d) The Court of Appeals ruling which erroneously attempts to assert that; "Appellant (Petitioner) frankly stated that he gave no specific consideration for the subject 253 shares" of Rock Wool Company capital stock is completely refuted by Petitioner's testimony as referred to on pages 18 and 19 of his Petition for Writ of Certiorari, and wherein judicial cognizance is requested to the unwarranted badgering of Petitioner while testifying under oath in the trial Court's attampt to cause Petitioner to testify falsely that no consideration existed for Petitioner's purchase of said stock certificate (EXHIBIT "G"), and in definance of Petitioner's answer to the trial Court's question, and to wit:

"Do I understand that it is your testimony that Mrs. Sellers assigned this stock certificate and executed the additional assignment (EXHIBITS "F" and "G") to you for no cash consideration but for consideration of your doing certain investigative work about the company? It that right? And to which Petitioner answered: No, it is not correct, Your Honor, it was for money that I had spent, already had spent, and for services which I was to perform (for Respondent)."

5. The Court of Appeals ruling is designedly silent in re the duly executed, irrevocable and verified sale and assignment instrument (EXHIBIT "F"), which ruling states (As cited in the petition for Writ of Certiorari, pp. 28-29), viz: "Appellant (Petitioner), by complaint * * * had sought * * * to recover from appellee-defendant (Repondent) the physical possession of stock certificate No. 1 representing 253 shares of the Rock Wool Insulating Company * * *". However, such evasion ignores and denies Petitioner's right, as set forth in his said complaint, to

recover his stolen personal property, viz, the Original of said sale and assignment instrument (EXHIBIT "F"). Such ruling also evades, ignores and denies Petitioner's right of recovery of said piece of stolen property, under the purview of the Colorado Stock Transfer Act, viz, C. R. S. 31-11-1; the Colorado Larceny Act, viz, 40-5-2, 13 and 14; the Colorado R. Civ. P. viz, Rule 104 (m) C. R. Civ. P. (As cited in the Petition for Writ of Certiorari, APPENDIX "C", "D" and "E", respectively), and in denial of the due process of law unto Petitioner concerning his right to recover the Original of said EXHIBIT "F", independent of his right to recover the Original of said EXHIBIT "G", and in violation of the aforesaid Statutes and Rules.

6. The cases listed by the Court of Appeals (As cited in the Petition for Writ of Certiorari, Footnote on p. 28 thereof) have no bearing on, or relationship to Petitioner's within Replevin suit of and concerning recovery of each of his said stolen pieces of personal property as shown by EXHIBITS "F" and "G". In each of such cited cases the Rock Wool Co. Certificates of Stock which Petitioner sought to Replevin never had been in Petitioner's possession, as same were pledged as security for certain loans. However, in said cited Brennan v. Will's case, said Stock Transfer Act, viz, C. R. S. 31-11-1 (As cited in the Petition for Writ of Certiorari, APPENDIX "C", p. 30) had previously been established by said District trial Court and Court of Appeals, as the controlling law for the transfer of title to corporate stock. Contrary to such cited cases it is significant that, the Originals of each of said Certificate of Stock No. 1, and the pertinent sale and assignment instrument (As shown by said EXHIBITS "F" and "G") were in Petitioner's possession at all

times since the delivery thereof to Petitioner by Respondent in September, 1954, and as stolen from him by Respondent in 1957-1958, and as stated in paragraph (2) hereof, and which the Court of Appeals conceded in its affirmance of the dismissal of Petitioner's within Replevin suit (See: Petition for Writ of Certiorari, APPENDIX "B", pp. 28-29). The Court of Appeals in the within Replevin suit now desires to contradict its judgment in said Brennan v. Will's case and thereby arbitrarily, capriciously and unlawfully deny Petitioner his rights under the aforesaid laws and rules, and thereby deny Petitioner his rights to the due process of law to recover either piece of his said stolen property as shown by said EXHIBITS "F" and "G".

7. The District trial Court and the Court of Appeals disregarded, ignored and denied Petitioner, the ruling of this Court in the case of Disconto-Gessellschaft v. U. S. Steel Co., concerning the binding effect of the executed and irrevocable contract by and between Petitioner and Respondent, concerning the endorsement in blank of said Certificate of Stock, and the pertinent sale and assignment, and the simultaneous delivery of each of said executed documents to Petitioner in September 1954, and thereby denied Petitioner his rights to the due process of law to recover each one of pieces of personal property in his within Replevin suit. (See: Petition for Writ of Certiorari, pp. 13-14).

In CONCLUSION it can be said without any reservation that, were the extant denial of Petitioners right to the due process of law to recover each piece of his stolen personal property to prevail, then, justice could only be considered as a dead and lifeless thing. Essentially the

facts of the matter, are, that Petitioner entered into a binding and irrevocable employment contract with Respondent in 1954, wherein he was to perform certain services and incur expenditures therein, for and on behalf of Respondent, whereupon, Respondent in compensation therefor delivered to Petitioner the Original of said Rock Wool Co. Certificate of Stock No. 1, as well as the duly excuted sale and assignment instrument (EXHIBITS "F" and "G").

Significantly, in 1954 the Rock Wool Co. capital stock was worthless, however in 1957-1958, when Respondent stole the Original of said Certificate of Stock No. 1 (EXHIBIT "G"), and with fraudulent intent and design stole said pertinent sale and assignment instrument (EXHIBIT "F"), the said capital stock had become very valuable, and as the Court of Appeals asserted, was incident to Petitioner's efforts and expenditures, and which services and expenditures said Court arbitrarily, capriciously and wrongfully asserted had no value, although, Respondent accepted such services and expenditures under oath as valuable consideration for the purchase of said Certificate of Stock and the sale thereof to Petitioner, as evidenced by said documents as shown by said EXHIBITS "F" and "G", and by the terms on the involved and expressed contract by and between Petitioner and Respondent, and of which the said Courts possessed no lawful authority to modify, change or ignore, or to evaluate Petitioner's services, and wherein Respondent had at no time instituted any rescission of said sale and assignment contract as shown by said EXHIBITS "F" and "G". WHAT THEN HAS PETITIONER RECEIVED FOR HIS YEARS OF ARDUOUS WORK AND EXPENDITURE OF HIS LIFE SAVINGS IN MAKING SAID CAPITAL STOCK

VERY VALUABLE? The jury in its verdict rendered on February 2, 1965, answered that question by its finding of damages in the amount of $54,000.00 in favor of Petitioner, as based upon the facts, evidence, testimony and credibility of the witnesses at the trial thereof, as held in the District Court on February 1 and 2, 1965.

WHEREFORE, by reason of the foregoing, it is submitted, that in the interests of justice, and Petitioner's right to the due process of law, in recovery of his said stolen pieces of personal property, and each separately, that the dismissal of this Court's Order denying the Petition for Writ of Certiorari be vacated and set aside, and that a rehearing and reconsideration thereof be granted in accordance with matters and things in the "CONCLUSION" as set forth on page 26 of said Petition for Writ of Certiorari.

Respectfully submitted,

JOSEPH M. BRENNAN, *Petitioner Pro Se*
P. O. Box 1115
Denver, Colorado 80201

EXHIBIT "G"

INCORPORATED UNDER THE LAWS OF THE STATE OF COLORADO

No. [redacted] Shares 353

[redacted] GAS & OIL COMPANY

CAPITAL STOCK $10,000.00

THIS CERTIFIES THAT David L. Sellers & Bertha E. Sellers, joint tenants is the owner of Three Hundred Fifty-Three Shares of the Capital Stock of [redacted] GAS & OIL COMPANY, fully paid and non-assessable, transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its corporate seal to be hereunto affixed this 7th day of March A.D. 1957

Anna Blackwell Secretary

Anthony E. Reilly President

$100 Par Value EACH

Dup: Ex 2 1959 Dec 31 Ex M

6192 Kerr-McGee Corp. 8/12/63

8/12/63 6192 Ex h # 4

6192 Kerr-McGee Corp. #1 30 8/12/63 M.S.N.

For Value Received hereby sell, assign and transfer unto _____

_____

Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

_____

to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated _____ 19__

In presence of

_____

David L. Sellers

Bertha E. Sellers

SIGNATURE THE COLORADO [redacted] GUARANTEED

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE IN EVERY PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATEVER

[redacted]-CERT.

EXHIBIT "F"

For and in consideration of the payment of Ten Dollars ($10.00) and other valuable considerations the receipt hereof is hereby confessed and acknowledged, the undersigned party(s), namely, David L. Sellers and Bertha E. Sellers hereby sells, assigns and transfers unto Joseph M. Brennan, all my (our) right, title and interest in or to the Capital Stock of the Rock Wool Insulating Company (a Colorado Corporation), as registered on the books of the said company in my (our) name(s), viz: David L Sellers and Bertha L. Sellers which Capital Stock ownership is represented by and duly executed and issued Stock Certificated of the said company, to wit:

Certificate No.	No. of Shares	Date of Issue.	Signed by Company Officers
1	253	March 17,1947	Anthony E. Reilly, President, and Anne Blockhan Secy. & Treas.

And, I (we) David L. Sellers and Bertha E. Sellers do hereby irrevocably constitute and appoint the said Joseph M. Brennan to transfer, or cause to be transferred, the said Stock on the books of the said Rock Wool Insulating Company with full power of substitution in the premises.

Dated at Denver, Colorado this _____ day of August A.D. 1954.

D.L. Sellers
David L. Sellers

Bertha E. Sellers
Bertha E. Sellers

STATE OF COLORADO)
COUNTY OF DENVER) SS.

David L. Sellers and Bertha E. Sellers on lawful age, first having been duly sworn upon our oath, deposes and says that I (we) have executed the above and foregoing instrument as my (our) free, independent and voluntary act and deed this 28th day of Sept A.D. 1954.

Subscribed and sworn to before me this 28th day of Sept A.D. 1954.

Notary Public

My Commission Expires March 28, 1956

6393
DEF EX 5
Dec 4, 1959

6393
DEF EX 5
Dec 3, 1959

Depo Exhibit 79-E for ID. 5/7/63
4/15/63